

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

77-4118

United States Court of Appeals

FOR THE SECOND CIRCUIT

THE LONG ISLAND RAIL ROAD COMPANY,
Petitioner,

v.

THE UNITED STATES OF AMERICA, and
THE INTERSTATE COMMERCE COMMISSION,
Respondents,

S & K FARMS, INC., and
FREIGHT USERS ASSOCIATION OF LONG ISLAND, INC.,
Intervening Petitioners,

SOUTHERN PACIFIC TRANSPORTATION COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and UNION PACIFIC RAILROAD COMPANY,
Intervening Respondents.

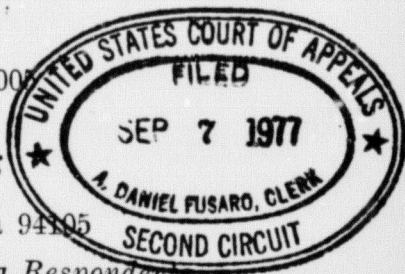
PETITION FOR JUDICIAL REVIEW OF AN ORDER
OF THE INTERSTATE COMMERCE COMMISSION

BRIEF OF INTERVENING RESPONDENTS

ROBERT P. SHAUGHNESSY
80 Pine Street
New York, New York 10005

JOHN MACDONALD SMITH
Southern Pacific Building
One Market Plaza
San Francisco, California 94105

Attorneys for Intervening Respondents



INDEX

	PAGE
Preliminary Statement	1
Statement of Issues Presented	7
Statement of the Case	7
A R G U M E N T :	
POINT I—	
The scope of review of Commission decisions is exceedingly narrow	13
POINT II—	
Record before the Commission contains no evi- dence of Section 3(1) violation	14
POINT III—	
No violation of Section 1(6) established by LIRR	17
POINT IV—	
The existence of a developing divisions dispute among the railroads further justified the ICC declination to enter an order concerning the dif- ferences in rates	18
CONCLUSION	20

TABLE OF CASES CITED OR REFERRED TO

	PAGE
<i>Atlantic Coast Line R. Co. v. Cape Fear Railways, Inc.</i> , 218 I.C.C. 152 (1936)	17
<i>Bowman Transp. v. Ark.-Best Frt. System</i> , 419 U.S. 281 (1974)	13
<i>Denver & R.G.W.R. Co. v. Union Pacific R. Co.</i> , 287 I.C.C. 611 (1953)	15
<i>Fresh Fruits and Vegetables, Transcontinental East-bound</i> , Docket No. 36432, Sub-No. 1	9
<i>Sunkist Growers, Inc. v. The Akron, Canton & Youngstown Railroad Co.</i> , Docket No. 35960	17, 18, 20
<i>United States v. Pennsylvania R.R. Co.</i> , 242 U.S. 208 (1916)	17

TABLE OF STATUTES CITED OR REFERRED TO

Administrative Procedure Act, 5 U.S.C. § 500 et seq.	
Section 557(b)(2)	3
Section 556(d)	14
Interstate Commerce Act, 49 U.S.C. § 1 et seq.	
Section 1(5)	17
Section 1(5)(b)	4
Section 1(6)	4, 5, 14, 17
Section 3	4
Section 3(1)	4, 5, 14, 15

	PAGE
Section 15(6)	19
Section 15(6)(a)	19
Section 15(7)	2
Section 15(8)(a)	3
Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act")	3, 6
Railroad Retirement Act	11

United States Court of Appeals

FOR THE SECOND CIRCUIT

THE LONG ISLAND RAIL ROAD COMPANY,

Petitioner,

v.

THE UNITED STATES OF AMERICA, and
THE INTERSTATE COMMERCE COMMISSION,

Respondents,

S & K FARMS, INC., and
FREIGHT USERS ASSOCIATION OF LONG ISLAND, INC.,

Intervening Petitioners,

SOUTHERN PACIFIC TRANSPORTATION COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and UNION PACIFIC RAILROAD COMPANY,

Intervening Respondents.

PETITION FOR JUDICIAL REVIEW OF AN ORDER
OF THE INTERSTATE COMMERCE COMMISSION

BRIEF OF INTERVENING RESPONDENTS

Preliminary Statement

Effective September 15, 1976, the Southwestern Railroads, in conjunction with their connections to the east and south, filed with the Interstate Commerce Commission ("Commission") a comprehensive revision of rates on fresh perishables moving in refrigerator cars from points

in Southwestern territory to destinations in the midwest, east, and south. The principal rail movements taking place under the Southwestern rates consisted of various fresh vegetables from the Rio Grande Valley and Winter Garden districts of Texas, where intervening respondents Southern Pacific Transportation Company ("SPT") and Missouri Pacific Railroad Company ("MOP") are the originating carriers.

The new rates represented substantial increases over the prior rates, which the railroads believed were not sufficient to cover the costs of transportation. The increased rates applied to all destinations in the midwest, east, and south, except to destinations on the Long Island Rail Road Company ("LIRR"), which refused to concur in the new rate scale, thereby retaining the old low rates to destinations on LIRR. Tariffs containing joint through rates, such as that involved here, require the affirmative concurrence of every railroad participating in the routing, and if one carrier refuses to give its concurrence, as did LIRR here, the rate change cannot become effective to points on that line, and the old, lower rates remained in effect on shipments to LIRR points.

After the rates were filed with the Commission a number of protests were filed by shippers and receivers, as a result of which the Commission instituted an investigation into their reasonableness and lawfulness. It could have, but elected not to, suspend the new tariff rates during the pendency of the investigation. Interstate Commerce Act, Section 15(7) (49 USC § 15(7)).

An oral hearing was held at Washington, D.C., on November 15 and 16, 1976, at which oral and documentary evidence was introduced by the parties. The respondent railroads presented economic and traffic evidence in justification of the new higher rate scales; the Texas Citrus &

Vegetable Growers & Shippers Association ("Texas Growers") appeared and offered evidence in opposition to the new rates. Although the new rates did not extend to the Long Island Rail Road, because of LIRR's non-concurrence, LIRR sought leave to intervene in the proceedings, and appeared at the hearing, requesting the Commission to order increased rates, but not up to the level published by the other railroads to New York City and adjacent areas in New York State.

Briefs were filed, and the matter submitted for decision.

Under Section 15(8)(a) of the Interstate Commerce Act, 49 USC § 15(8)(a), as amended by the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), rate investigation proceedings such as this, instituted prior to the effective date of the tariff schedule, are under a statutory mandate requiring the Commission to render a final decision within 7 months, unless the Commission explains to Congress why it is unable to decide a particular case within that time framework. In such cases, the Commission customarily makes a finding in the statutory language of the Administrative Procedure Act, 5 USC § 557(b)(2), that "due and timely execution of its functions" requires omission of the initial decision by the Administrative Law Judge who heard the case. In this proceeding, however, an initial decision was issued by the Administrative Law Judge. We note from it that on January 18, 1977, the Commission did authorize waiver of the issuance of an initial decision, but on February 4, 1977, voted unanimously to refer the Administrative Law Judge's report back to the judge for release as his initial decision, subject to exceptions by the parties. Initial Decision (I.D.), page 2.¹

¹ Joint Appendix 21a (hereafter J.A. p.).

The Administrative Law Judge's initial decision found that the railroads did not have "market dominance" over the traffic involved, a point conceded by the shipper protestant, the Texas Growers. I.D. page 33.²

This had important consequences under Section 1(5)(b) of the Interstate Commerce Act, as revised by the 1976 4-R Act (49 USC § 1(5)(b)); a finding of no-market-dominance precludes the Commission from finding the rates in question to be unreasonably high, i.e., to exceed "a just or reasonable maximum for the service rendered". While the rates might still be vulnerable under other provisions of the Interstate Commerce Act, such as those governing discrimination, (49 USC § 3), a finding of no market dominance precludes the rates from being condemned as unreasonably high.

Notwithstanding the conceded finding of no-market-dominance, the Administrative Law Judge ("ALJ") believed the Commission had authority to, and should, require revisions in the rates as published. Invoking authority to control "unreasonable practices" (49 USC § 1(6)) and "undue or unreasonable preference or advantage" (49 USC § 3(1)), the ALJ ordered the railroads to publish a new scale of rates at 30,000 pounds minimum weight, the rates to be 10% above the 40,000 pound rates contained in the tariffs filed by the carriers; ordered the railroads to publish "stopping in transit" rules to make the rates applicable if up to 3 stops in transit were included to complete loading; and ordered the railroads to publish rates similarly constructed to points on the LIRR, but *lower* than those otherwise applicable to New York City and adjacent areas not on the LIRR, such rates to be set at a level, which when added to LIRR's "terminal surcharge",

² J.A. p. 52a.

would make the total charges paid by any receivers on the Long Island Rail Road the same as those paid by receivers in nearby areas not on the Long Island Rail Road.

The Administrative Law Judge's initial decision was the subject of vigorous exceptions by the railroads³ to which the Texas Growers and LIRR replied.

By decision and order dated April 13, served April 20, 1977, the Commission, Division 2,⁴ modified the initial decision in a number of important respects.

It found the Judge's proposed prescription of a scale of 30,000 pound rates "not justified by the evidence of record"; Decision, page 3.⁵ The Commission further found that the prescription of a requirement for multiple stops in transit "is not warranted" and would result in a "further deterioration of the expedited service so necessary in the transportation of perishable commodities"; Decision, page 4.⁶ With respect to the Long Island's contention, Division 2 found that "the record does not show that receivers on the LIRR are unduly prejudiced by the difference in rates and none have appeared or otherwise complained that they are so prejudiced" and that the "evidence of record" does not establish that the lower rates to points on the LIRR, when combined with the LIRR's terminal surcharge, result in unequal transportation charges in such a way as to violate Section 1(6) and 3(1) of the Interstate Commerce Act; and that inasmuch as a divi-

³ J.A. pp. 55a-81a.

⁴ Commission members serve on Divisions which administer particular provisions of the Interstate Commerce Act. Rate and tariff provisions of the Act are administered by Division 2.

⁵ J.A. p. 109a.

⁶ J.A. p. 110a.

sions dispute is in progress between the LIRR and other railroads, being handled under procedures established therefore in the 4-R Act, it was inappropriate for the Commission to make any further determination at this time on the Long Island's request; Decision, page 3.⁷

The Commission found that, considering all the evidence of record, the investigated rates are shown to be just and reasonable and otherwise lawful. Decision, page 4.⁸

LIRR filed a petition for a finding of general transportation importance, to which, under ICC rules, no reply was permitted.⁹ An organization named "Freight Users Association of Long Island, Inc." sought post-decisional intervention for the purpose of supporting the petition of LIRR for a finding of general transportation importance, which would reopen the matter for further Commission handling.¹⁰ The other railroad respondents replied, urging that good cause had not been shown for intervention, citing the Commission's own rules of practice and prior decisions on intervention issues.¹¹

By order dated May 18 and served May 25, 1977, the Commission denied the petitions for intervention and a finding of general transportation importance.

LIRR thereafter filed this petition for review in this Court. By order dated July 18, 1977, these intervening respondents were granted leave to intervene in support of

⁷ J.A. p. 109a.

⁸ J.A. p. 110a.

⁹ 49 CFR § 1100.101 (a)(4).

¹⁰ J.A. p. 114a-118a.

¹¹ J.A. p. 119a-124a.

the Commission. We were duly served with LIRR's brief, and a late brief of Freight Users et al., and it is to the arguments therein raised that this reply brief is directed.

Statement of Issues Presented

1. Whether the ICC's decision complained of was capricious or arbitrary, or contrary to statutory authority, or unsupported by substantial evidence.
2. Whether the Commission's conclusion *not* to prescribe higher rates to LIRR points was arbitrary or capricious.

Statement of the Case

We note, after reviewing the opening briefs of LIRR and Freight Users Association—S&K Farms ("FUA"), that a restatement of what the Commission *did* and what the Commission *did not do* is essential in establishing the framework for this review proceeding. The issue before the Commission was the reasonableness and lawfulness of an extensive series of increased tariff rates applying from the southwest (principally Texas, but also including Oklahoma and Missouri) to the midwest, east, and south, *except* to destinations on LIRR. To LIRR points, the old, lower rate scales continued to apply, unaffected by the increases, because of LIRR's refusal to concur in the rate changes. The fundamental issue fought out before the Commission was whether the substantially increased rates were lawful, giving due consideration to the interests of the growers, the consumers, and the railroads. The Commission concluded that the increases had been shown to be justified, a conclusion which the Texas Growers accepted, for they are not a party to this litigation. The only remaining facet of

the controversy is a subsequently-introduced issue: Whether the Commission, while approving the increased rates to eastern territory, should also have required the railroads to publish increases from the old, lower basis to LIRR destinations. The Texas Growers did not support this request. No receiver on the LIRR appeared at the hearing to support LIRR's request for the prescription of higher rates. No receiver and no shipper complained of the disparity of rate levels which would result in the New York area if the Commission did not order increases in the LIRR rates.

Thus in reviewing the statement of the case as presented by intervenor FUA, it must be borne in mind that these Long Island intervenors sat on their hands during the pendency of the proceedings before the ICC, made no representations to the ICC until after a final decision had been rendered, and gave the Commission no evidence of the rate disparities, if any, or the commercial consequences of such rate disparities. So far as the record before the Commission shows, the new tariff schedules which it reviewed and approved are substantial increases over the prior rates, so that LIRR receivers, rather than being prejudiced, are given a fortuitous "break". We are at a loss to understand the arguments of FUA (opening brief, page 3) that *if* LIRR should concur in the higher rates approved by the Commission to New York, and *also* add its 12½% terminal surcharge, the resultant charges to LIRR points would be 12½% higher than those to New York City, not on LIRR. The short answer to this speculation is that it hasn't happened, nor has LIRR given any intimation that it proposes to do so. If and when such an event should come to pass, FUA will have ample remedies before the Commission to protest, to seek suspension, or to file a formal complaint. Such speculation, and such con-

jecture, form no proper basis for judicial intervention at this time.

The reference in FUA's brief (Appendix A) to a formal complaint filed with the Commission June 24, 1977, is even more obscure. It is not part of the record under review. The Commission has made no ruling nor determination on the issues raised in that complaint. A reading of the complaint shows that the real concern of this receiver on Long Island is shipments *from California, not rates from the southwest*. Rates from California were *and still are* under study by the Commission in a pending proceeding in Docket 36432 Sub-No. 1 entitled "Fresh Fruits and Vegetables, Transcontinental Eastbound". This is the proceeding referred to at page 1 of the initial decision;¹² an extensive cost study has been undertaken in that proceeding, a procedural schedule has been established, and hearings will be held in the future, at which time the California growers, eastern receivers, Long Island receivers, and LIRR will have full opportunity to be heard. The complaint of S&K Farms *can be completely cured by a Commission order in the Transcontinental proceedings* directing the Long Island to join, without terminal surcharge, in the Transcontinental rates from California which have been published to New York generally, but which LIRR refused to publish. But that controversy is not ripe for judicial intervention at this time.

The sole question presented here is whether the Commission committed reversible error in declining LIRR's request to order increased rates to LIRR points. The record before the Commission shows that no shipper or receiver supported this request. No shipper or receiver complained of any unreasonable practice or unreasonable

¹² J.A. p. 20a.

preference or prejudice resulting if the status quo to Long Island Rail Road points were maintained. The only remaining dispute was a dispute between the railroads over how to divide the rates, and the record clearly established that a formal divisions dispute was in progress which, if not voluntarily resolved, could be adjudicated by the Commission in formal proceedings in accordance with its statutory authority. Inasmuch as the record showed no shipper, receiver, nor consumer support for the issuance of a summary order directing LIRR to apply, at least on an interim basis, the same rates as were published to nearby points not on LIRR, the Commission committed no error in declining to make an order at this time. The Commission, like the courts, has quite enough to do in deciding immediate controversies involving issues generated on the record by the parties. It does not decide abstract cases, and should not hypothesize unreasonable practices, preference, or discrimination on a record completely devoid of any probative evidence tending to establish the existence of such conditions.

The Commission's order instituting investigation did not bring in issue rates to LIRR points, because LIRR was not included in the tariff under review. LIRR sought leave to intervene and present evidence concerning a supposed need to prescribe increased rates to LIRR points, as well. The growers did not support this request. The receivers on LIRR did not support this request. The receivers not on LIRR did not complain of the non-application of increases to LIRR points. There was thus a total failure of proof on the new issue raised by LIRR, and it cannot now be heard to complain of the Commission's action.

The "statement of the case" offered by LIRR (brief, pages 4-6) asserts that the foundation for this case was 1973 legislation requiring substantial increases in railroad

retirement tax expenses. This claim must be put in perspective, for it has nothing to do with the controversy at hand, except as it may help explain LIRR's obdurate refusal to concur in rate changes which the rest of the industry approved.

In 1973, Congress revised the Railroad Retirement Act (the railroads' counterpart to Social Security) to reduce the employees' contributions to equal those paid by workers under Social Security. The additional contribution, formerly paid by the employees, was shifted to the employers, but the railroads were at the same time given authority to publish a rate increase to offset the additional cost.

Approximately 90% of LIRR's employees are engaged in passenger, rather than freight service. Rather than offset the increased compensation expenses by seeking commutation fare increases, or a larger state subsidy, LIRR sought to recoup from its freight shippers as much as possible of the increased compensation expense. While other railroads about the country agreed upon a uniform 2.8% general increase to offset the additional compensation expense, LIRR succeeded in publishing a 12½% "terminal surcharge", and limited the publication in such a way that it was not required to share this revenue with any other railroad, but kept the entire 12½% for itself.

The consequence of this action was to substantially increase LIRR's earnings from long haul traffic coming from the southwest and the far west.

When the railroads agree upon the publication of a rate which has application over the lines of several carriers, and possibly via differing routings and gateways, how much each carrier receives of the total charge is fixed by divisions agreements, either voluntarily negotiated or fixed after hearing by the ICC. To illustrate, prior to a 1973

readjustment of LIRR's divisions, LIRR would receive from 4.4 to 6.0% of the total revenue on traffic originating on the west coast; after a 1973 readjustment by the ICC, this percentage was increased approximately 20%.¹³ Thus whereas under standard divisional arrangements LIRR received, for example, about 7% of the total revenues on west coast traffic, publication of the terminal surcharge gave it 7% *plus* 12½% of the joint charge, thereby doubling and tripling the revenue which LIRR would receive from long haul shipments. In order to avoid offending its taxpayer-receivers, however, LIRR undertook to manipulate the joint through rates to which it applied its surcharge, so that the total charge, through rate plus surcharge, approximated the through rate to nearby destinations not on the LIRR. It was able to do this because of its legal veto power over rate increases, by simply refusing to concur in periodic inflation-offsetting increases published by the railroad industry. When the railroads revised their rates on perishables from the southwest, LIRR exercised its veto power and refused to concur. The net result was that the new rate scales did not apply to destinations on the LIRR, and the Commission's order of investigation bringing the new rates under study did not include LIRR, which was not a party to the rates.

The foregoing is the background for LIRR's action. We note that LIRR's opening brief (pages 7-10) recites portions of the Administrative Law Judge's initial decision to explain LIRR's position. It must be understood that the quoted language does not constitute part of the Administrative Law Judge's discussion or findings, but is taken from a portion of the ALJ's initial decision reciting LIRR's contentions.¹⁴ The material there quoted is a

¹³ J.A. p. 132a.

¹⁴ J.A. pp. 37a-41a.

faithful synopsis of LIRR's arguments on brief, and LIRR is thus presenting, in an elliptical way, its statement of position as summarized by the ALJ.

The quotation at the foot of page 10 of LIRR's opening brief is the only quotation from the initial decision in LIRR's "statement of the case" which constitutes part of the ALJ's findings. This language was *expressly ordered stricken* by the Commission.¹⁵

ARGUMENT

POINT I

The scope of review of Commission decisions is exceedingly narrow.

It is settled that the function of a reviewing court in cases such as this, is extremely limited, to determining whether there is warrant in law and fact for the Commission's action, i.e., whether the ICC order is capricious or arbitrary, contrary to statutory authority, or unsupported by substantial evidence. See, for example, *Bowman Transp. v. Ark.-Best Frt. System*, 419 U.S. 281 (1974) at 285-86.

Contentions as to scope of review are the domain of the ICC, and properly so, and we purposely shall not engage in extended argument in demonstration of the point, which shall doubtless be exhaustively covered by the Commission's brief.

We find no contention in petitioner's opening brief that the ICC's result is not supported by substantial evidence. We read the brief as urging that, on the record facts, failure to order increases in LIRR rates to the level sought by LIRR was an *unreasonable practice* in violation of Sec-

¹⁵ J.A. p. 110a.

tion 1(6) (49 USC § 1(6)) and constituted *undue preference and prejudice* in violation of Section 3(1) (49 USC § 3(1)). We shall address these contentions next.

POINT II

Record before the Commission contains no evidence of Section 3(1) violation.

It must be borne in mind that the issue of rates to LIRR destinations was not encompassed by the Commission's order instituting investigation. The tariffs then ordered investigated *contained no new rates to LIRR points*. The entire issue of rates to LIRR points was thereafter raised by LIRR, which requested the Commission to take certain action. As the proponent of certain proposed action, it had the burden of going forward with the evidence to support the proposed action, and it carried the burden of persuading the Commission that the action which it sought should justly and reasonably be required. 5 U.S.C. § 556(d).

As earlier stated, there was a total failure of proof on the part of LIRR. The Commission's order granting LIRR's Petition for Leave to Intervene opened the door to LIRR's participation, but if that carrier had any probative evidence to offer, it was left behind at Jamaica Station. LIRR's attempt to invoke Section 3(1) of the Interstate Commerce Act underscores the point.

The holdings of the ICC are clear: The preference, prejudice, and discrimination provisions of Section 3(1) are intended for the protection of shippers and receivers, and not for the protection of the private interests of carriers. No findings are made under Section 3(1) on the basis of evidence given by carriers alone; evidence must be given by those who pay and bear the freight charges, explaining

how the carriers' rates work an undue preference and prejudice on their commercial activities, before relief will be awarded. The Commission's rule is that "a railroad could not raise, in its own behalf, an issue under Section 3(1) against another railroad". *Denver & R.G.W. R. Co. v. Union Pacific R. Co.*, 287 I.C.C. 611 (1953) at 619.

The practical reason for this rule is demonstrated by the facts of this case. At oral argument the court may wish to ask Long Island counsel:

The Court:

"About your claim that the rate difference between New York City and Long Island creates a Section 3(1) problem which the Commission should have corrected. Isn't this a problem 100% within LIRR's control, that is, if you had accepted the offer of the other railroads to join in the New York City basis of rates, and exempted those rates from your terminal surcharge, then the rate levels would be the same, and there couldn't be any Section 3(1) problem? And you could cure that problem without the necessity of the Commission or this Court issuing any orders, couldn't you? And then you could still carry on your dispute with the other railroads over how to divide the revenues, couldn't you?"

To which LIRR counsel would of necessity reply:

"Yes, that is true, but we didn't want to handle the issue that way, we wanted the Commission to peremptorily order the other railroads to take less."

To which the Court might well inquire:

"But the same result, that is, removal of any Section 3(1) problem because of difference in rates, could as easily be reached if the Commission should order

LIRR to join in the rates maintained by the other carriers to New York and instruct you not to apply your terminal surcharge on this traffic?

To which the answer must also necessarily be "yes", to which the Court might further wish to inquire:

"What evidence did you introduce, or what evidence in the record is there, from growers and consumers, warranting the intervention of the Commission at this time on an issue that so far appears to be a dispute among the railroads?

The answer of necessity must be "there is no evidence in the record on this issue from growers, receivers, or consumers".

Which indeed could prompt a further question:

"If the problems arising out of the rate differences can be eliminated in two ways, either by LIRR joining in the rates offered by the other carriers, not subject to its terminal surcharge, or by directing the other carriers to take less on shipments to LIRR, what specific evidence, other than the argument and statement of position referred to in the Joint Appendix¹⁶ did you offer the Commission as an evidentiary basis for picking one or the other courses of action?

To which the answer is necessarily:

"The record shows that we asked the other carriers to take less, and they refused to do so."

And that, we submit, is simply not an evidentiary foundation for Commission action. The Commission did not err in refusing to attempt a summary treatment of this intra-industry dispute in this rate case.

¹⁶ J.A. pp. 129a-136a.

POINT III

No violation of Section 1(6) established by LIRR.

LIRR asserts that there is a violation of Section 1(6) inherent in the rate differences between New York City and Long Island points. This claim is without merit.

Section 1(6) (49 USC § 1(6)) prohibits unreasonable "regulations and practices"; Section 1(5) (49 USC § 1(5)) prohibits unreasonable *charges*. The Commission decision found that Section 1(5) had not been violated by the rail publication which did not include points on LIRR. The problem complained of by LIRR is a rate problem, not a "regulations and practices" problem. The Commission has specifically held that rate differences resulting from the refusal of a carrier to join in joint rates are not comprehended by Section 1(6) of the Act. *Atlantic Coast Line R. Co. v. Cape Fear Railways, Inc.*, 218 I.C.C. 152 (1936), 155. The Supreme Court has also confirmed that Section 1(6) must be read in context, and not given a meaning beyond its stated scope. *United States v. Pennsylvania R. R. Co.*, 242 U.S. 208 (1916), 229.

Nor is there an irreconcilable inconsistency between the Commission's action here and the ICC's decision in Docket 35960, *Sunkist Growers, Inc. v. The Akron, Canton & Youngstown Railroad Co.*, May 31, 1977 (not printed), referred to at page 14 of the petitioner's opening brief. The *Sunkist* case involved a shipper complaint in which there was direct shipper testimony objecting to the differences in rates, and in which the shipper requested the Commission to cure the situation by ordering LIRR to join in the rates published by other railroads, not subject to its terminal surcharge. Instead, the Commission ordered the other railroads to accept less, giving rise to the claim of error and the petition for review by the other railroads.

In *Sunkist*, therefore, the Commission had a record before it in which the shipper requested that the Commission act to eliminate the rate differences. The Commission selected, as we see it, the wrong alternative, giving rise to review proceedings in court. Here, however, there is no shipper, receiver or consumer evidence of any need on the part of the Commission to act at this time, to select either alternative, or to adjust the differences at all. Absent an appropriate evidentiary basis from grower, receiver or consumer evidence, the Commission was entirely justified in refusing to interject itself at this time into what was an evident dispute between LIRR and the other railroads.

POINT IV

The existence of a developing divisions dispute among the railroads further justified the ICC declination to enter an order concerning the differences in rates.

It is clear from the record that LIRR had no objection to the rate levels developed by the other railroads for application to southwestern fruits and vegetables moving to New York. There is nothing in the LIRR pleadings, evidence, or argument, to suggest that the total charges proposed by the other railroads, and collected on shipments to New York City, are too high, too low, or anything other than just right. LIRR suggests that such charges should be collected from receivers on its line. The point of departure, of course, is that LIRR is unwilling to concur in the group rate publication to which every other railroad had assented, because LIRR wants more money than would be produced for it by the last (1973) divisions readjustment ordered by the Commission. When one carrier asserts that the rate level is satisfactory, but that it wants more

money for the work which it does, there is a divisions dispute, no matter what label the holdout carrier may apply to its conduct.

If the Commission had eliminated the rate difference at New York City by ordering LIRR to join in the rates published by the other roads, not subject to its terminal surcharge, LIRR would apparently have been dissatisfied with the amount which it received for its services. If the Commission had ordered the other railroads to accept less, then they would have been dissatisfied with the amount which they received for their work. The very heart of the controversy before the court, it should be apparent, is not over the size of the pie, but how the pie should be divided, and specifically whether LIRR receives a 6%, 12%, or 18% slice, or something else. LIRR concedes on this record that a divisions dispute, following the course dictated by these specific requirements of Section 15(6) of the Interstate Commerce Act (49 USC § 15(6)) is now in progress. If not settled through voluntary negotiations, the Commission will in due course hold hearings and, in the words of the statute, "shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respecting operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstances which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge." 49 USC § 15(6)(a)

Once the divisions dispute between LIRR and the other railroads is settled, whether by negotiation or by Commis-

sion order, the question presented to this court by LIRR could not again arise. On shipments from the southwest, or the west coast, LIRR would receive specific percentages of the through revenue, and those percentages shall have been finally determined. There will be no basis for withholding concurrence in joint rates published by the railroads generally to New York State, for LIRR's fair share of the through charges will have been fixed, either by agreement or by final order.

In *Sunkist* the record contained shipper evidence from a shipper who could not wait until the intra-industry dispute was resolved, and the Commission therefore felt impelled to act. Here no shipper, receiver, or consumer supports the entry of a peremptory interim order by the Commission, and the Commission was entirely justified in refusing to enter any such preliminary order while the major dispute among the carriers was in progress.

CONCLUSION

For the reasons herein set forth, this Court should find that the Commission's decision has warrant in the facts and the law, and the petition of LIRR should be dismissed.

Respectfully submitted,

ROBERT P. SHAUGHNESSY
80 Pine Street
New York, New York 10005

JOHN MACDONALD SMITH
Southern Pacific Building
One Market Plaza
San Francisco, California 94105

Attorneys for Intervening Respondents

September 7, 1977

UNITED STATES COURT OF APPEALS
For The Second Circuit

No. 77-4118

THE LONG ISLAND RAIL ROAD COMPANY,
Petitioner,

v.

THE UNITED STATES OF AMERICA, and THE INTERSTATE
COMMERCE COMMISSION,

Respondents,

S & K FARMS, INC., and FREIGHT USERS ASSOCIATION
OF LONG ISLAND, INC.,

Intervening Petitioners,

SOUTHERN PACIFIC TRANSPORTATION COMPANY, THE
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
MISSOURI PACIFIC RAILROAD COMPANY, ST. LOUIS
SOUTHWESTERN RAILWAY COMPANY, and UNION PACIFIC
RAILROAD COMPANY,

Intervening Respondents.

Petition For Judicial Review of An Order Of
The Interstate Commerce Commission

Affidavit of Service By Mail

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

Louis Mark, Being duly sworn, deposes and says: That he is over twenty-one years of age: That on the 7th day of September 1977 he served two copies of the attached Brief Of Intervening Respondents on each of the following named by enclosing said copies in fully post-paid wrappers addressed as follows and depositing same in The United States Post Office maintained at No. 350 Canal Street, New York City, New York.

Donald I. Baker, Esq.
Assistant Attorney General
Department of Justice
Washington, D.C. 20530

Mark L. Evans, Esq.
General Counsel
Interstate Commerce Commission
Washington, D.C. 20423

Richard H. Stokes, Esq.
Long Island Rail Road
Jamaica Station
Jamaica, New York 11435

- Page 2 -

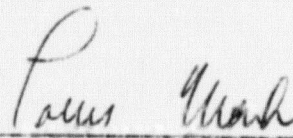
Ronald K. Kolins, Esq.
1666 K Street
Washington, D.C. 20006

Joseph M. O'Malley, Esq.
1138 Six Penn Center
Philadelphia, Pennsylvania 19104

Robert Stahlheber, Esq.
210 N. 13th Street
St. Louis, Missouri 63103

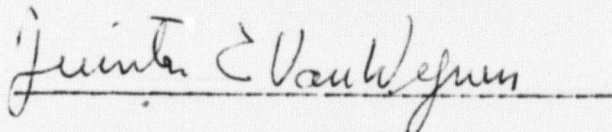
Walter J. Myskowski
706 Ring Building
1200 18th Street, N.W.
Washington, D.C. 20036

Augello & Pezold, P.C.
120 Main Street
P.O. Box Z
Huntington, New York 11743



Louis Mark

Sworn to before me this
7th day of September 1977



QUINTON C. VAN WYEN
Notary Public, State of New York
No. 24 4087465
Qualified in Kings County
Commission Expires March 30, 1979

LEX PRINTING CO., INC., 451 GREENWICH ST., N.Y. 10013--966-4300